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Decedents' Estates and Trusts—Fraudulent Destruction of Wills

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substitutionary gift had been intended, the Court started with the principle that words are not to be rejected if they can reasonably be made consistent,[37] and then construed the whole will in order to determine the testator's basic intent.[38] The Court on reading the entire will found ample evidence that the testator knew how to provide for an indefeasibly vested remainder in the eleventh paragraph of the same document and concluded that since he knew the correct method of accomplishing this, his use of different words meant he had a different intention.

As pointed out by Judge Fuld in his dissenting opinion, it is equally clear that the testator knew how to provide for substitutionary gifts when he intended them.[39]

It appears that there is a basic difference between the *Larkin* and *Gulbenkian* cases in that in the *Larkin* case there were explicit words of survivorship. The only question to be answered was survive whom. In the *Gulbenkian* case it is doubtful if survivorship was intended at all.

D. G. M.

FRAUDULENT DESTRUCTION OF WILLS

Section 143 of the Surrogate's Court Act provides that "A lost or destroyed will can be admitted to probate in a surrogate's court, but only in cases where the will was in existence at the time of the testator's death, or was *fraudulently destroyed* in his lifetime." (Emphasis added.) The issue of what constitutes the fraudulent destruction of a will arose in *In re Fox's Will*.[40] In that case decedent was an American citizen residing in Germany during World War II. Fearing that the German Government would confiscate a United States trust of which he was the beneficiary, he executed a will exercising a power of appointment in favor of petitioner, a United States resident. The corpus of the trust was seized in the United States by the Alien Property Custodian. In 1944 the will was destroyed in a bombing raid. The decedent learned of the destruction of the will but failed to execute a new one. He died two years later at which time petitioner brought this action under Section 143. The Surrogate, finding that the will had been fraudulently destroyed, admitted it to probate.[41] The Appellate Division reversed, dismissing the petition.[42]

The Court of Appeals found that the will was fraudulently destroyed.

37. In re Buechner, 226 N.Y. 440, 123 N.E. 741 (1919).
38. In re Gautier's Will, 3 N.Y.2d 502, 169 N.Y.S.2d 4 (1957).
39. In re Gulbenkian's Will, 9 N.Y.2d 363, 368, 214 N.Y.S.2d 379, 385 (1961): In each of paragraphs Third and Fourth, for instance, he gave $50,000 to a named sister and explicitly provided that, "in case of her prior death," the bequest was to go to her decendants per stirpes.
40. 9 N.Y.2d 400, 214 N.Y.S.2d 405 (1961).
41. 17 Misc. 2d 773, 184 N.Y.S.2d 747 (1959).
42. 9 A.D.2d 365, 193 N.Y.S.2d 794 (1st Dep't 1959). The petition was dismissed on the grounds that the destruction of the will had been orally adopted by the decedent. This was error since it is clear that oral declarations of the decedent are incompetent to establish or revoke a will. In re Staiger's Will, 243 N.Y. 468, 472, 154 N.E. 312, 314 (1926); In re Kennedy's Will, 167 N.Y. 163, 170, 60 N.E. 442, 444 (1901).

Whenever a will previously executed cannot be found after the death of the testator, there is a strong presumption that it was revoked by the testator.[43] The purpose of Section 143 is to give an intended beneficiary the opportunity to overcome this presumption and gain the legacy he would have received if the will had not been destroyed. Since the effect on the beneficiary is the same whether the will was accidently or intentionally destroyed, courts will find constructive fraud where it can be shown that the will was destroyed without the knowledge of the testator.[44] The majority thus interprets the term "fraudulently destroyed" as referring not to the motive for destruction but solely to the agency of destruction. Thus if a will is destroyed by accident or without the knowledge (at the time of destruction), consent, or procurement of the testator, it was done so in a manner fraudulent to the testator.[45]

The dissenting opinion is in accord with the majority to the extent that when the testator has no knowledge of the act, it will presume that there is constructive fraud. However, when a testator, knowing that his will has been annihilated, accepts the fact and does nothing about it despite a reasonable opportunity to make a new will, the dissent argues that he has not been a victim of fraud, actual or constructive.

The cases from which the majority derived its rule can all be distinguished from the case at bar.[46] In those cases there is no evidence showing that the testator ever knew of the destruction of his will. In the present case, it is clearly evident that the testator had such knowledge. In an earlier case, *Timon v. Claffy*,[47] the will was destroyed with the testator's knowledge but not in conformance with the Decedent Estate Law.[48] There, even though the destruction was not according to statute so that it did not revoke the will, it was still held that the will was not fraudulently destroyed. The majority distinguished this case because there was also undue influence present which it felt was the real basis for the decision. However, as a minimum there is dicta in the case which supports the dissenting opinion and research discloses no cases in which a fraudulently destroyed will was admitted to probate where the testator at the time of his death had actual knowledge that his will was destroyed.

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43. Collyer v. Collyer, 110 N.Y. 481, 486, 18 N.E. 110 (1888); In re Kennedy's Will, supra note 42; In re Staiger's Will, supra note 42.

44. Schultz v. Schultz, 35 N.Y. 653 (1886); In re Breckwoldt's Will, 170 Misc. 883, 11 N.Y.S.2d 486 (Surr. Ct. 1939); In re Dorrity's Will, 118 Misc. 725, 194 N.Y. Supp. 573 (Surr. Ct. 1922); In re Gethins' Will, 97 Misc. 561, 163 N.Y. Supp. 398 (Surr. Ct. 1916).

45. Schultz v. Schultz, supra note 44; In re Breckwoldt's Will, supra note 44.

46. Ibid.

47. 45 Barb. 438 (1865), aff'd, Conroy v. Claffy, 41 N.Y. 619 (1869).

48. N.Y. Dec. Est. Law § 34:

> No will in writing . . . shall be revoked or altered otherwise than by some other will in writing . . . executed with the same formalities with which the will itself was required by law to be executed; or unless such will be burnt, torn, canceled, obliterated or destroyed, with the intent and for the purposes of revoking the same . . . and when so done by another person, the direction and consent of the testator, and the fact of such injury or destruction, shall be proved by at least two witnesses.

It also seems that the majority opinion is misconstruing the intended meaning of Section 143. The statute refers to fraud. It is straining the meaning of the statute to find constructive fraud where the will was accidently destroyed without the testator's knowledge. It is unrealistic to find fraud, actual or constructive, when the testator had knowledge of the events which occurred and had a reasonable opportunity to execute a new will but failed to do so prior to his death.

J. D. R.

INTERVENTION IN PROBATE PROCEEDINGS ALLOWED IF RIGHTS MAY BE AFFECTED

Section 147 of the Surrogate's Court Act permits any person to file objections to the probate of a will who is "interested in the event as a devisee, legatee or otherwise."[49] This section is in accordance with the more general right to intervene set forth in Section 193-b of the Civil Practice Act.[50] In an earlier decision, *In re Davis' Will*,[51] the Court of Appeals interpreted Section 147 to include only a person having a pecuniary interest to protect, either as an individual or in a representative capacity. By this the Court meant anyone who would be deprived of property in a broad sense or who would be entitled to property by probate of a will.[52]

In the recent case of *In re Turton*,[53] the Court was called upon to determine whether the Surrogate's Court had properly denied a motion by the government of British Honduras to intervene specially in probate proceedings pending in that court.[54] Decedent was domiciled in British Honduras, as were his descendants who were all illegitimates. Prior to the commencement of the action in the Surrogate's Court, a court of British Honduras had ordered that a will left by the decedent, purportedly executed in 1918, be admitted to probate "until a later will be found." Thereafter, an action was brought in the British Honduras court to have the 1918 will declared revoked and to probate the alleged will of 1955 as a lost or destroyed testament. While that action remained undetermined, the New York Surrogate assumed jurisdiction to probate the 1955 will, basing jurisdiction on the presence in New York of stock

49. N.Y. Surr. Ct. Act § 147:
Any person interested in the event as devisee, legatee or otherwise, in a will, codicil offered for probate . . . may file objections to any will or codicil so offered for probate.
50. N.Y. Civ. Prac. Act § 193-b:
Upon timely application any person shall be permitted to intervene in an action . . . (c) when the applicant has an interest in real property, the title to which may be affected by the judgment . . . (d) when the applicant is so situated as to be adversely affected by a distribution or other disposition of property in the custody of or subject to the control of or disposition by the court or an officer thereof.
51. 182 N.Y. 468, 75 N.E. 530 (1905).
52. Id. at 472, 75 N.E. at 534.
53. 8 N.Y.2d 311, 206 N.Y.S.2d 761 (1960).
54. 20 Misc. 2d 569, 192 N.Y.S.2d 254 (Surr. Ct. 1959), aff'd, 9 A.D.2d 759, 193 N.Y.S.2d 1001 (1st Dep't 1960).